80-6291

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. _____

JOSEPH CALDER,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1). The judgment of the Court of Appeals was filed on January 31, 1979.

QUESTION PRESENTED FOR REVIEW

Whether there was sufficient proof at trial to establish the jurisdictional element under the Hobbs Act.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED:

United States Constitution

This case involves the Commerce Clause of the United States Constitution.

Statutes:

This case involves the application of the commerce clause to the Hobbs Act, 18 U.S.C. §1951.

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PETITION FOR A WRIT OF CERTIORARI
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FOR THE SECOND CIRCUIT

Petitioner, JOSEPH CALDER prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered against him on February 10, 1981, which affirmed: (1) a district court judgment convicting petitioner of extortion in violation of 18 U.S.C. § 1951.

Opinions Below

The Court of Appeals affirmed each of the judgments of conviction in an opinion, United States v. Calder et al., F. 2d 2d Circuit Slip Sheet Ops., September Term, 1980, at p.1365.The Opinion of the Court of Appeals is annexed hereto as Appendix "A".

STATEMENT OF THE CASE

A. THE GOVERNMENT'S CASE

The Government's case consisted of witnesses who were the owners and employees of two "topless bar" establishments in Manhattan, known as "Adam and Eve" and "Guys and Dolls Au Go Go", who testified that during the period from September, 1978 to October, 1979 appellant Joseph Calder demanded and received three hundred dollars a week as "protection money" from each business. In general, each of the witnesses testified that Mr. Calder performed no services for the three hundred dollars, a contention vigorously contested on cross-examination and during the defense case. No evidence was presented of physical harm to any individual, or of any property damage in connection with the alleged threats made to certain witnesses.

The Government's investigation of this case began after Robert Fimbel, who used the name Robert Williams while working as night manager in the Adam and Eve bar, was being investigated for paying a bribe to a building inspector in late 1978 (T.106-107, 261-263).* Fimbel, a police officer concerned with losing his job and his pension, agreed to cooperate with the New York City Department of Investigation and the FBI (T. 266-268).

He told the FBI, and testified at trial, that appellant Joseph Calder had requested "protection money" so that "nothing happens" in the place (T.96-97). After Fimbel spoke to Sol Sizer, owner of the bar, Calder was paid three hundred dollars a week from the cash register (T.98). This sum was paid to appellant every Wednesday when he visited the bar, usually accompanied by co-defendant George Monge, who carried a gun (T. 102-104).

*Numbers preceded by "T" refer to pages of trial transcript

Although Fimbel was "fearful" that he would be hurt, he himself carried a gun strapped to his ankle and would himself serve as a "bouncer" for rowdy patrons in the bar (T. 129, 227, 258-259). Furthermore, Fimbel testified that he had a personal relationship with Mr. Calder and entered into "serious discussions" with him regarding their going into the bar business together (T. 245-247).

When Fimbel was cooperating with the FBI he taped a conversation with appellant, and testified that although it was important for him to get some threats of extortion on the tape, such threats never materialized (T. 273).

According to the Government, owners Sol Sitzer and Arnold Yourman "independently" came to the FBI not knowing that Fimbel was cooperating. Both Sitzer (who named Adam and Eve and had an interest in Guys and Dolls) and Yourman, who testified that he owned Guys and Dolls,* testified about payments to Calder based upon fear. They further explained that Adam and Eve, a "juice bar" serving non-alcoholic beverages and Guys and Dolls, which had a liquor license, charged outrageous prices for drinks. For example, a bottle for which they paid $3.00, sometimes sold for $500.00. In most cases the bottles were de-alcoholized wine (T. 496-497). Both owners testified to extensive "skimming" operations which allowed them to take hundreds of thousands of dollars from their businesses and fail to report this as income on their tax returns (T.482, 563, 574, 702, 777). Sitzer and Yourman were granted immunity in connection with the instant case, and, in addition neither have filed amended returns or paid back taxes due and owing the Government (T. 617, 745).

During the course of Arnold Yourman's testimony, it was developed that he had originally sought to borrow money from Calder to "buy out" Sitzer, with whom he was having a dispute. This dispute concerned whether Guys and Dolls dancers should go "bottomless" or stay "topless".

*There was a serious question whether Yourman was merely a "front" for Sitzer at Guys and Dolls since Sitzer was barred by the State Liquor Authority from having any interest in liquor-serving establishments (T 480-486, 630).

Accordingly, Yourman was introduced to Julius "Red" Calder, Joseph Calder's brother. At no time did Calder agree to the requested loan (T.671-674). According to Yourman, suddenly his employees were threatened by Joseph Calder and he then began paying them money. At the request of the FBI, he subsequently taped conversations with Julius Calder, in which he made no threats, but merely offered to help Yourman with any problems he had (T. 748-749).

When the FBI made its entry into the case, Sitzer and Yourman were told to advise Joseph and Julius Calder that they were being shaken down by a "John Corbo Gang" for "protection money." Payments to Joseph Calder stopped during October of 1979 for three weeks. During the course of these conversations no threats were made by appellant Joseph Calder, who indicated that he didn't know what they (the agents posing as extortionists) were talking about (T.910). It is significant that during the period that the Calders were "fired" by the topless bars, no damage was done and no threats appear on tape. Furthermore, it was Yourman who was calling the Calders for help in handling the "Corbo Gang" situation (T. 912, 804).

In October, 1979 all the defendants were arrested in a car outside the Adam and Eve Bar after Joseph Calder was alleged to have received a three hundred dollar payment. This money was marked by the FBI, who were surveilling Calder from the time he left the bar to the time of his arrest a few minutes thereafter. None of the marked money was ever seized by the agents although they thoroughly searched the four occupants of the vehicle, and the vehicle itself (T. 1268-1272).

B. THE DEFENSE CASE

None of the defendants testified on their own behalf. Joseph Calder called three witnesses. The first two, Nora Petrella and Joseph Ricevuto, were employees at Adam and Eve and Guys and Dolls, respectively. They both testified that Joseph Calder was at the premises not only on Wednesdays, but some three to four days a week, staying there four or five hours each day (T. 1188-1189, 1233). In addition, they stated that he performed certain functions inside the premises, such as calming down rowdy patrons and stopping fights (T. 1195, 1235). There was further testimony that Joseph Calder's function in the bar might have been to protect against raids by the police or liquor authorities (T. 1226-1230).

Appellant also called Father Sebastian Buccellato, who explained that the nickname "Joe Priest" derived from appellant's days as a seminarian and that he was known as such among the clergy as well as others in the community (T. 1263-1265).

Co-defendant George Monge called Guy Maggiore as a witness. Maggiore, a twenty-one year old friend of Monge, testified that Monge was dating Calder's daughter and would often drive him around because Calder was a diabetic and had once "blacked out" behind the wheel. Maggiore testified that he had also driven appellant into the city upon occasion (T. 1281-1286).

REASONS FOR GRANTING WRIT

THERE WAS INSUFFICIENT PROOF AT TRIAL TO ESTABLISH THE JURISDICTIONAL ELEMENT UNDER THE HOBBS ACT.

The Government's proof at trial was insufficient to satisf the jurisdictional requirement of the Hobbs Act. The evidence failed to provide a nexus between the three hundred dollars rec weekly by appellant and any impact, however minimal, on interst commerce. Furthermore, there was no evidence that the victims' chases in interstate commerce were in any degree depleted by pay to appellant.

The pertinent language of the Hobbs Act, 18 U.S.C., 1951, vides in pertinent part:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion . . . is in violation of the Act.

Although the courts has construed the above language to includ affects on commerce that are de minimus, "potential" or "subtle" United States v. Augello, 451 F2d 1167, 1169-70 (2d Cir. 1971), denied, 405 U.S. 1070 (1972); United States v. Tropiano, 418 F2 1076 (2d Cir. 1969), cert. denied, 397 U.S. 1021 (1970); United v. Daley, 564 F2d 645, 649 (2d Cir.), cert denied, 435 U.S. 933 some effect has always been a necessary predicate. In the inst case, however, there is simply no nexus between the acts alleged interstate commerce. In short, the interstate commerce allegat merely a sham to provide federal jurisdiction.

The testimony adduced at trial, offered to provide this es element of the offense beyond a reasonable doubt, was given sho shrift by the prosecution [1].

---

1 TESTIMONY OF SOL SITZER:

Q Now, during the years 1978 and 1979, did you purchase fo used at Adam and Eve?
A Yes.

The Government failed to produce any invoices or documents to show that goods were actually from out of state, nor were there any inquiries into how many purchases were made from out of state

---

[1]Continued.

Q And basically where was that purchase (sic) from?
A. Flagstaff Food Corporation in New Jersey.
Q Did you also purchase juices which were sold at Adam and Eve?
A. Wines, juices, champagnes, non-alcoholic beverages, beers.
Q When you say wines, do you mean the de-alcoholized wines?
A De-Alcoholized, non-alcoholic wines that came from Canada.
Q Where did you purchase juices from or wines?
A The wines, Martinelli Wine Company in Canada.
THE COURT: In Canada?
THE WITNESS: Yes, sir.
Q And from which company did you purchase such items as garbage bags, etc.?
A There is a Minisco in New Jersey. Minisco Plastic Bag Company, I'm not sure. I know its Minisco. (T.456-457)

TESTIMONY OF ARNOLD YOURMAN

Q Now, during this period of time, 1978 through 1979, from what corporation did Guys and Dolls purchase its food?
A Flagstab (sic) Corporation. They were a New Jersey Company.
Q Did you have any other goods shipped from out of State?
A Yes. From outside the State we used to get our garbage bags. It was called Municipal Company. They are in Palisades Park, New Jersey. We got our ballons (sic), our decorations from a company in -- I think it's in East Rutherford. I'm not sure of the address.
Q Did you purchase any juices at Guys and Dolls?
A Yes
Q Did any of that come from out of State?
A No, not the juices.
Q But the food came from out of State?
A Correct.
Q Now, during the year from approximately September of '78 through September of -- or October, 1979, how much money was paid out of the assets of Guys and Dolls to Joseph Calder?
A Approximately $15,000.
Q Did that have any impact on your profits?
A Yes, it did.
Q To what extent?
A $15,000 that I didn't have to work with (T. 687-688).

concerns[2]. In addition, Sol Sitzer testified on cross-examination that the bottles of cider for which he paid two dollars were sold for three hundred and fifty to five hundred dollars each (T. 520). It was painfully obvious that the customers who frequented the Adam and Eve and the Guys and Dolls establishments were not paying this money for the beverages, but because of the topless women who worked in the bar, who provided sexual services (T. 637). To suggest that somehow the resources of these bars were depleted by the payments to Calder so as to diminish their purchasing power in interstate commerce (See United States v. Merolla, 523 F2d 51, 54 (2d Cir. 1975); United States v. Addonizio, 451 F2d 49 at 77 (3d Cir. 1972), cert. denied, United States v. Demet, 486 F2d 816 (7th Cir. 1973), cert. denied, 416 U.S. 969 (1974), is so highly conjectural as to be unrealistic.

The most persuasive factor which militates against a finding of any interference with interstate commerce is the testimony of owners Yourman and Sitzer regarding their extensive skimming of cash (hundreds of thousands of dollars) from the businesses in question (T. 482, 563, 574, 702, 777). On a daily basis large amounts of cash were taken from the cash register by the owners and appropriated by them to evade paying income tax. It is not disputed that Calder was paid out of these cash receipts. Accordingly, the evidence shows that the cash payments to appellant merely depleted the owners' own cash

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[2] Government counsel expressed his own concern whether there was sufficient evidence to sustain the jurisdictional element when, near the conclusion of the Government's case, he asked the Court whether the evidence was "sufficient from a legal standpoint." The Court refused to give an "advisory opinion" on the issue (T.1091-1092).

Appellant Calder move pursuant to Rule 29 of the Federal Rules of Criminal Procedure for a dismissal based upon the failure of the Government to prove the affect on interstate commerce, which motion was denied by the Trial Court (T. 1598-1599).

hoards, and in no way depleted their businesses' purchasing power to pay their distributors (who would surely be paid by check and taken as an ordinary business deduction). Accordingly, absent the showing of an "actual impact" on interstate commerce, United States v. Crowley, 504 2nd 992, 997 (7th Cir. 1974), or a "realistic probability", United States v. Staszcuk, 517 2d 53, 60 (7th Cir.) (en banc), cert. denied, 433 U.S. 837 (1975), that the extortionate activity would have some effect on interstate commerce, however small, the Government failed in its burden of proving the requisite nexus. We are thus left with a local matter of no substantial federal concern.

CONCLUSION

For all the above reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

KENNETH J. KAPLAN
Assigned Counsel for
petitioner JOSEPH CALDER

New York, New York
February 23, 1981

UNITED STATES COURT OF APPEALS
For the Second Circuit

Nos. 353, 382, 476, 477 September Term 1980

(Argued November 13, 1980 Decided February 10, 1981

Docket Nos. 80-1245, 1247, 1249, 1281

- - - - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA,

Appellee,

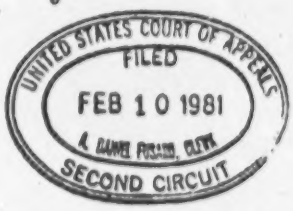
v.

JOSEPH CALDER, JULIUS CALDER, THOMAS DI DONATO and GEORGE MONGE,

Appellants.

- - - - - - - - - - - - - - - - - - - -x

80-1245



BEFORE: WATERMAN, MANSFIELD and VAN GRAAFEILAND, Circuit Judges.

Appeals from judgments convicting Joseph Calder, Julius Calder, and George Monge on two counts of obstruction of commerce by extortion and one count of conspiracy and Thomas DiDonato on one count of conspiracy, following a jury trial before Judge Nickerson in the United States District Court for the Eastern District of New York. Appellant Monge also asserts that the District Court erred in imposing sentence upon him. Affirmed in all respects.

KENNETH KAPLAN, New York, N.Y. (Kaplan & Katzberg, New York, N.Y., for Appellant JOSEPH CALDER

HARVEY L. GREENBURG, New York, N.Y., for Appellant JULIUS CALDER

GERALD L. SHARGEL, New York, N.Y. (Graham Hughes, of Counsel, on the Brief), for Appellant THOMAS DI DONATO

BARRY BASSIS, New York, N.Y. (Legal Aid Society, Federal Defender Services Unit, New York, N.Y.), for Appellant GEORGE MONGE

EDWARD R. KORMAN, United States Attorney, Eastern District of New York
(Thomas P. Puccio, United States Department of Justice, Attorney-in-Charge; Kenneth F. McCallion, Joel Cohen, Special Attorneys, of Counsel), for Appellee UNITED STATES OF AMERICA

This case involves the extortion of money from two bars with the descriptive names of "Guys and Dolls" and "Adam and Eve", located in midtown Manhattan. The proof, which we must view in the light most favorable to the Government, shows that, beginning in September 1978, Joseph Calder, accompanied by George Monge, extorted $300 weekly from each of these bars. There was evidence that the extortion continued for over a year, the take from each bar totalling approximately $15,000.

Eventually, the FBI was called upon for help, and it devised a plan to halt the extortion and to apprehend those responsible for it. The gist of this plan was that FBI agents would pose as members of a rival gang attempting to shake down the same bars. Through this ruse, the Government secured ample, properly-admitted evidence tying Joseph Calder's brother Julius and Thomas DiDonato to the extortion scheme.[1] On the night of October 31, 1979, all four appellants were arrested while in a car parked outside the Adam and Eve. Joseph Calder had just collected the weekly $300 payment and had informed the manager that he and DiDonato "would be around from now on" to pick up the money. Monge was carrying a pistol, and a baseball bat was found in the back seat of the car.

Appellants were convicted under the Hobbs Act, 18 U.S.C. § 1951, which makes federal offenses of robbery, extortion, and conspiracy to rob or extort, if they "in any way or degree" affect interstate commerce. The Calder brothers and Monge were convicted on two substantive counts and one conspiracy count; DiDonato was convicted on only the conspiracy count. Their principal argument on appeal is that the evidence was insufficient to show the impact on interstate commerce required by the statute and that

District Judge Nickerson erred in instructing the jury on this point. We find no merit in either contention.

The Government proved that both bars purchased food and other items from firms in New Jersey, and that Adam and Eve, a "juice bar" without a liquor license, purchased de-alcoholized wine from a Canadian company. Extortion's effect upon such interstate commerce need only be minimal to give rise to Hobbs Act jurisdiction. United States v. Augello, 451 F.2d 1167 (2d Cir. 1971), cert. denied, 405 U.S. 1070 (1972). "Given the sweeping power of Congress under the Commerce clause, . . . particularly evident in the Hobbs Act, . . . it is enough that the extortion 'in any way or degree' . . . affects commerce, though its effect be merely potential or subtle." Id. at 1169-70 (citations omitted). Here, the resources of each bar were depleted by $15,000 in a period of one year. There can be little question that this depletion was sufficiently deleterious to the efficient operation of these establishments to affect, albeit potentially or subtly, their interstate transactions. This was sufficient to sustain Hobbs Act jurisdictions. See United States v. Daley, 564 F.2d 645, 649-50 (2d Cir. 1977), cert. denied, 435 U.S. 933 (1978).

Judge Nickerson instructed the jury that if it found "beyond a reasonable doubt that the goods were purchased for 'Adam and Eve' and 'Guys and Dolls' in interstate or foreign commerce and that money or property was obtained from them by extortion, then, as a matter of law, interstate or foreign commerce was affected." The substance of this charge has been approved in this and other circuits on numerous occasions. See, e.g., United States v. Augello, supra, 451 F.2d at 1170; United States v. Cerilli, 603 F.2d 415, 423-24 (3d Cir. 1979), cert. denied, 444 U.S. 1043

(1980). It was for the court to determine as a matter of law the jurisdictional question of whether the alleged conduct affected interstate commerce; it was for the jury to determine whether the alleged conduct had in fact occurred. See United States v. Ricciardi, 357 F.2d 91, 94 (2d Cir.), cert. denied, 384 U.S. 942 (1966).

The only other challenge to the verdict which merits comment involves the admission of certain evidence against Julius Calder. Julius Calder spent the day following his arrest in the Metropolitan Correctional Center, where he met a fellow inmate, Joseph Bennett. During a conversation with Bennett, Calder admitted that he had been shaking down a topless bar in Manhattan. Bennett had been indicted for conspiracy to transport stolen motor vehicles in interstate commerce. Although Bennett's attorney had discussed with the United States Attorney the possibility that his client might cooperate in the stolen car case, no cooperation agreement was entered into until November 16, 1979, some two weeks after the conversation between Calder and Bennett.

Citing United States v. Henry, 48 U.S.L.W. 4703 (June 16, 1980), Calder argues that his Fifth and Sixth Amendment rights were violated when the incriminating statement was admitted into evidence. We disagree. The Supreme Court held in Henry that the Government had deliberately elicited a jailhouse admission made by the appellant to a fellow inmate who was a paid informer working on a contingent fee basis. While holding the testimony of the informer to be inadmissible, the Court implicitly approved the admission of similar incriminating testimony by another of Henry's cell mates who was not a paid informer and had no arrangements to report on conversations with Henry. Id. at 4704 n.3 and 4706 n.13. Bennett was not acting as a Governmen

agent when he talked with Calder. Like the neutral witness in Henry, he was not disqualified.

Appellant Monge was fined $5,000 on Count One and sentenced as a youth offender to seven years in the custody of the Attorney General. Sentence was suspended on Count Two, and Monge was placed on probation for five years consecutive to Count One. Sentence also was suspended on Count Three, and Monge was placed on probation for three years consecutive to Count Two. Appellant Monge contends that the sentence under Counts Two and Three were improper.

In making this argument, Monge relies upon Ninth and Tenth Circuit holdings, which require sentences imposed on youth offenders under multi-count indictments to be consistent in order not to thwart the rehabilitative intent of the Youth Corrections Act. See United States v. Magdalero-Aguirre, 590 F.2d 814, 815 (9th Cir. 1979); United States v. Ortiz, 513 F.2d 198 (9th Cir.), cert. denied, 423 U.S. 843 (1975); Roddy v. United States, 509 F.2d 1145, 1147 (10th Cir. 1975); Price v. United States, 384 F.2d 650, 652 (10th Cir. 1967). In United States v. Ortiz, the twenty-one year old defendant was sentenced under 18 U.S.C. § 5010(b) on a narcotics conspiracy count and was given a consecutive five-year sentence as an adult on the companion substantive count, with the sentence suspended and the defendant placed on probation. The court vacated the five-year sentence, holding that it was inconsistent for the district judge to treat the defendant as an adult, after having found by implication that he would derive benefit from the rehabilitative treatment to be provided under the Youth Corrections Act.

The reasoning of the foregoing cases is not without merit. However, it does not apply to our case. Judge Nickerson did not impose sentence under Counts Two and Three

He suspended the imposition of sentence and simply placed the defendant on consecutive terms of probation. This he was permitted to do by the express language of the Act.

Section 5023 provides that nothing in the Act "shall limit or affect the power of any court to suspend the imposition or execution of any sentence and place a youth offender on probation . . . ." It also provides that the Act shall not be construed to repeal or amend the provisions of the general probation chapter, section 3651 of which permits a court to suspend the imposition or execution of sentence and place the defendant on probation. See Durst v. United States, 434 U.S. 542, 543-44, 549-50 (1978); United States v. Buechler, 557 F.2d 1002, 1006 (3d Cir. 1977).

Commitment under sections 5010(b) and 5010(c) is "in lieu of the penalty of imprisonment otherwise provided by law." Durst v. United States, supra, 434 U.S. at 552. When a court imposes probation and suspends the imposition of sentence, he is not sentencing the defendant to prison. In the strict sense of the word, he is not "sentencing" the defendant at all. See Dunn v. United States, 561 F.2d 259, 261 (D.C. Cir. 1977); United States v. Chappell, 480 F. Supp. 321, 324 (W.D. Okla. 1978). Assuming, for the argument, that sentences imposed on all counts in a youth offender case must be consistent, it does not necessarily follow that sentence must be imposed on all counts. The imposition of probation may be a proper exercise of the "flexibility [allowed a district judge] in choosing among a variety of treatment settings and programs tailored to individual needs." Durst v. United States, supra, 434 U.S. at 545. Like the fines and orders of restitution approved by the Court in Durst, suspension of sentence and probation may, in a particular case, be consistent with the

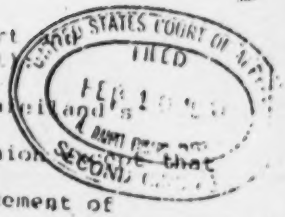
rehabilitative intent of the Act.

The judgments are affirmed.

FOOTNOTES

1. We find no merit in appellant DiDonato's argument that the evidence was insufficient to establish that he was a conspirator in the extortion scheme. His own statements showed him to be a person of authority in the extortion group, and this evidence was buttressed by properly-admitted testimony of his fellow conspirators.

MANSFIELD, Circuit Judge (Concurring in part and dissenting in part):



I concur in all of Judge Van Graafeiland's carefully considered and well-reasoned opinion except that portion upholding the district court's placement of defendant Monge on probation for periods beyond the seven-year term imposed upon him as a youth offender pursuant to 18 U.S.C. §5010(c).[1] In my view the court was precluded by 18 U.S.C. §5017(d)[2] from placing Monge on probation for the additional periods totalling five years beyond the seven-year term.

The district court was clearly authorized by §5010(c) to impose a seven-year prison term on Monge. Indeed Judge Nickerson could pursuant to §5010(c) have imposed concurrent terms upon Monge as a youth offender of up to 20 years on Counts 2 and 3, as authorized by 18 U.S.C. §1851. In the alternative, the district court could pursuant to §5023[3] have suspended the imposition or execution of sentence and placed Monge as a youth offender on probation. However, once the district court chose to impose a prison sentence on Monge, the sentence became subject to the terms of §5017(d), which provides that a youth offender "shall be discharged unconditionally on or before the expiration of the maximum sentence imposed, computed uninterruptedly from the date of conviction." (Emphasis supplied).

As Judge Van Graafeiland correctly notes, the imposition of probation under Counts 2 and 3 for terms extending beyond the seven-year sentence imposed on Monge as a youth offender under Count 1 was not strictly a "sentence" of the defendant. However, it clearly placed a

"condition" on the discharge of Monge as a youth offender of the maximum sentence (seven years) imposed on him as a youth offender under Count 1. The probation terms therefore violated §5017(d).

I would vacate the probation terms imposed on Monge on Counts 2 and 3 and remand the case for sentencing on these two counts. Upon such a remand Monge would face the risk that Judge Nickerson, upon learning that he was powerless to impose probation consecutively to the discharge of Monge as a youth offender, might decide that he was justified under the circumstances in imposing prison terms on these counts exceeding the seven-year period imposed on Count 1. See North Carolina v. Pierce, 395 U.S. 711 (1968).

FOOTNOTES

1/ Section 5010(c) provides:

"(c) If the court shall find that the youth offender may not be able to derive maximum benefit from treatment by the Commission prior to the expiration of six years from the date of conviction it may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter for any further period that may be authorized by law for the offense or offenses of which he stands convicted or until discharged by the Commission as provided in section 5017(d) of this chapter."

2 Section 5017(d) provides:

"(d) A youth offender committed under section 5010(c) of this chapter shall be released conditionally under supervision not later than two years before the expiration of the term imposed by the court. He may be discharged unconditionally at the expiration of not less than one year from the date of his conditional release. He shall be discharged unconditionally on or before the expiration of the maximum sentence imposed, computed uninterruptedly from the date of conviction."

3/ Section 5023(a) provides:

"(a) Nothing in this chapter shall limit or affect the power of any court to suspend the imposition or execution of any sentence and place a youth offender on probation or be construed in any wise to amend, repeal, or affect the provisions of chapter 231 of this title or the Act of June 25, 1910 (ch. 433, 36 Stat. 864), as amended (ch. 1, title 24, of the D. of C. Code), both relative to probation."

Supreme Court, U.S.
FILED
MAR 4 1981
Alexander L. Stevas, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-6291

JOSEPH CALDER,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

RECEIVED
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SUPREME COURT, U.S.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to the provisions of Title 28 U.S.C. §1915, and Rule 53 of the Rules of this Court, petitioner JOSEPH CALDER, asks leave to file the attached petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit without payment of costs and to proceed in forma pauperis.

The certificate of counsel for the petitioner in support of this motion is annexed hereto.

Kenneth J. Kaplan

KENNETH J. KAPLAN
Counsel for Petitioner
JOSEPH CALDER

New York, New York
February 23, 1981

Supreme Court, U.S.
FILED
MAR 4 1981
Alexander L. Stevas, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-6291

JOSEPH CALDER,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

RECEIVED
MAR 9 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

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CERTIFICATE OF COUNSEL IN SUPPORT
OF MOTION TO PROCEED IN FORMA PAUPERIS

KENNETH J. KAPLAN, ESQ., being a member of the Bar of this Court, and assigned by the United States Court of Appeals for the Second Circuit, pursuant to the Criminal Justice Act, to represent petitioner, hereby certifies as follows in support of petitioner's motion for leave to proceed without being required to prepay costs or fees:

1. The United States District Court for the Eastern District of New York assigned me to represent the petitioner at his trial in that court, due to the financial inability of petitioner to pay the costs of his defense.

2. The United States Court of Appeals for the Second Circuit, assigned me, pursuant to the Criminal Justice Act, to represent

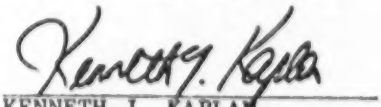
petitioner upon his appeal to that Court, due to petitioner's inability to pay the costs of his appeal.

3. Petitioner is not presently gainfully employed and has not been employed during the duration of my representation of him. Petitioner has advised me that he is unable to pay the costs of this petition, or to give security for the same, he further advised me that he believes he is entitled to the redress he seeks by the petition. He has requested me to file this petition on his behalf.

4. The nature of the petition for a writ of certiorari is as follows:

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was found guilty of extortion in violation of 18 U.S.C. §195. On June 6, 198, appellant was sentences to a six year term of imprisonment. He contends that he was denied a fair trial in that there was insufficient evidence to establish the jurisdictional requirement of an affect or interstate commerce under the Hobbs Act.

Respectfully submitted



KENNETH J. KAPLAN
Assigned Counsel for
Petitioner JOSEPH CALDER

New York, New York
February 23, 1981

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